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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1150

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., (Now INTERSTATE WASTE REMOVAL CO., INC.),

APPELLANTS,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

BRIEF OF THE STATES OF VERMONT AND NEW HAMPSHIRE AS AMICI CURIAE

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Interest of Amici Curiae

The amici are states with statutes that are similar in effect to the New Jersey statute here in issue.[1] This brief

[1] 24 V.S.A. §2204, §2205; NH RSA 147:30-e *et seq.* (Supp.).

seeks not simply to add weight to the position of the State of New Jersey but to support the outcome in the New Jersey Supreme Court not only on the basis of that Court's Commerce Clause analysis but also because the position taken by the Appellants would erode traditional and essential elements of State sovereignty, would diminish the motivation to solve essentially bistate or multistate problems by compact or regional agreements, and would tend to set populated and rural regions against each other when their interests should be cooperative and reciprocal.

Questions Presented

(1) Is planning for adequate solid waste disposal facilities an essential state governmental function (like planning for schools, roads, sewage treatment and police protection)?

(2) May a State, as a quasi-sovereign, limit the use of available sanitary landfill space to garbage collected within the State?

(3) Must available sanitary landfill space be deemed a commodity in commerce (like natural gas, milk, meat, fish or farm products)?

Summary of Argument

Properly analyzed, the commodity involved in the transportation of garbage and refuse located in one state into another for disposal is the available site rather than the garbage itself.

States possess the power to control solid waste disposal under their police powers, and regulation or maintenance of such facilities by municipalities is almost universal. Sanitary landfills are essential to modern community life and are so closely related to government functions and

purposes as to preclude their consideration as articles in commerce. States may conserve available landfill space for in-state garbage, just as any fundamental state services may be limited to the service of in-state residents and towns.

Even under Commerce Clause analysis, the New Jersey statute does not discriminate in favor of local interests.

The Appellants' arguments would discourage, not promote, cooperative interstate solutions to pressing solid waste disposal problems.

Argument

I. Garbage Shipped for Disposal Is Not Itself an Article in Commerce, for the Value in the Transaction Inheres Solely in (A) the Service of Removal and Transport and (B) the Available Disposal Site.

The answer to the constitutional questions here posed will depend on the proper analysis of the underlying transactions. The New Jersey Supreme Court concluded alternatively that either garbage should not be afforded the protection of the Commerce Clause because of its lack of value and danger to health[2] or, even if the service of transporting and disposing of solid waste constitutes interstate commerce, where the "negative implications"[3] of the Commerce Clause are concerned, the interests of interstate commerce are to be weighed against the "legitimate and valid exercise of the police power of the State."[4] The Court concluded:

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[2] *Hackensack Meadowlands Development Commission* v. *Municipal Sanitary Landfill Authority*, 68 N.J. 451, 348 A.2d 505, 512-513 (1975).

[3] 348 A.2d at 514.

[4] 348 A.2d at 516.

> "The Supreme Court has recognized that the protection of public health through the preservation of the environment is a valid, and indeed primary, objective of the police power. *Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440, 442, 80 S. Ct. 813, 4 L.Ed.2d 852, 855 (1960). Today it cannot possibly be questioned that the preservation of the environment and the protection of ecological value are, without more, sufficient to warrant an exercise of this power." 348 A.2d at 516.

In *Huron Portland Cement Co., supra,* Detroit's smoke abatement code applied to ships based in any state, and in fact the defendant there was a Michigan citizen. The classical balancing analysis begins with the assumption that the state law asserting police power over an interstate commercial function or activity applies equally to in-state functions or activities. *H. P. Hood & Sons, Inc.* v. *DuMond,* 336 U.S. 525 (1949).

Why then may the "legitimate and valid exercise of the police power"[5] asserted by New Jersey here differentiate out-of-state refuse from the domestic product?

Except where garbage or refuse are shipped in interstate commerce for commercial uses like animal feed, construction, recycling or the production of power,[6] we agree with the New Jersey Supreme Court that garbage and other objects intrinsically harmful are not objects in commerce. *Bowman* v. *Chicago & Northwestern Railway Co.,* 125 U.S. 465, 489 (1888); *Baldwin* v. *G.A.F. Seelig, Inc.,* 294 U.S. 511, 525 (1935); *Sligh* v. *Kirkwood,* 237 U.S. 52, 59-60 (1915).

Here it is not the intrinsic threat posed by garbage and refuse but the threat to the life expectancy of sanitary

[5] 348 A.2d at 516.
[6] 348 A.2d at 513.

landfills that is at issue. Accordingly, the true article in commerce is not the garbage itself but the yet-unfilled real estate suitable for garbage disposal within the state.

The landfill potential of a state is a resource, just as water, oil, coal or any other commodity is a resource. If garbage were intrinsically ambient or flowing, like air or water pollution, no one would suggest that it is an article in commerce any more than sewage or industrial smoke are so considered.

In terms of transactional analysis this case deals not with the issue of garbage as an article in commerce but with the power of New Jersey to prevent haulers of garbage and refuse from purchasing land use rights in New Jersey for the purpose of disposing of garbage and refuse originating outside the State.

If the resource at issue is the remaining open and available landfill space, the question before this Court at first blush is not unlike the question of the right of a state to limit the export of other resources, such as water,[7] natural gas[8] or other commodities.[9] But the resource of available land for solid waste disposal should not be viewed as simply another state product. The amici do not contend that land sites cannot be articles in commerce[10] or that the Supreme Court has given the states blanket authority to control the export of resources. We do assert that the resource of open and available landfill space is so closely related to the provision of necessary government services that the Commerce Clause analysis is inapplicable.

[7] *Hudson County Water Co.* v. *McCarter,* 209 U.S. 349 (1908); but see *City of Altus* v. *Carr,* 255 F.Supp. 828 (W.D. Tex. 1966) *aff'd per curiam* 385 U.S. 35 (1966).
[8] *West* v. *Kansas Natural Gas Co.,* 221 U.S. 229 (1911).
[9] *Toomer* v. *Witsell,* 334 U.S. 385 (1948).
[10] See Interstate Land Sales Full Disclosure Act, 15 U.S.C. §1701 *et seq.* (1968).

In any event there is ample reason to sustain the New Jersey enactment, even conceding *arguendo* that a balancing test like that in *Huron Portland Cement Co., supra,* is to be applied.

II. The Regulation of Solid Waste Facilities Is an Essential Governmental Function Within the Sovereign Powers of the States.

The amici assert that the maintenance of solid waste disposal facilities within a state is so essential to the maintenance of an ordered, healthful and pleasing environment that the operation or strict regulation of sanitary landfills has become much more an essential governmental service than an article in commerce. Commercial resources are generally found within a state because of nature (e.g., minerals or timber) or because of historical development (e.g., dairy products or manufactured goods). Solid waste disposal inexorably accompanies civilization and has always been a natural and necessary concern of government.[11] The point is not that the need to dispose of waste is more "vital" or "essential" to life than milk,[12] water [13] or natural gas.[14] Rather, it is the fact that solid waste disposal touches on so many aspects of governmental concern (e.g., regional planning, zoning, aesthetics, health and

[11] The Supreme Court of Michigan was guilty of only small hyperbole when it said:

> "The gathering of garbage is not a trade, business or occupation in any proper sense, and such employment does not come under the doctrine in reference to monopolies, or in reference to legislation in restraint of trade. It is a matter in which the public agencies are authorized to pursue the best means to protect the public health." *City of Grand Rapids* v. *DeVries,* 82 N.W. 269, 273 (Mich. 1900). See "Solid Waste Disposal by Means of Sanitary Landfill", 36 Albany Law R. 632 (1972).

[12] *Baldwin* v. *G. A. F. Seelig, Inc.,* 294 U.S. 511 (1935).

[13] *Hudson County Water Co.* v. *McCarter, supra,* note 7.

[14] *West* v. *Kansas Natural Gas Co., supra,* note 8.

environmental standards) which are susceptible to solution by social consensus and not by individual prerogative, that finds solid waste disposal essentially and necessarily associated with, and frequently a part of, state or local government. *Montgomery* v. *City of Galva,* 41 Ill. 2d 562, 244 N.E.2d 193 (1969); *Jansen Farms* v. *City of Indianapolis,* 202 Ind. 138, 171 N.E. 199 (1930); *City of Hobbs* v. *Chesport, Ltd.,* 76 N.M. 609, 417 P.2d 210 (1966); *Tayloe* v. *City of Wahpeton,* 62 N.W.2d 31 (N.D. 1953); *Boulevard Apartments, Inc.* v. *Mayor and Council of Borough of Lodi,* 110 N.J. Super. 406, 265 A.2d 838 (1970); 7 McQuillin, Municipal Corps. §§ 24.245, 24.253 (1968).

Perhaps the closest analogy to the present facts is presented by the attempt of some states to limit the export of water. See, e.g., Wyo. Stat. § 41-10.5 (Supp. 1974); "'It's Our Water!' — Can Wyoming Constitutionally Prohibit the Exportation of State Waters?", 10 Land and Water Law Review 119 (1975) (hereafter "Land and Water"); *Hudson County Water Co.* v. *McCarter,* 209 U.S. 349 (1908); but see *City of Altus* v. *Carr,* 255 F. Supp. 828 (W.D. Tex. 1966), *aff'd per curiam,* 385 U.S. 35 (1966). Whether or not *Altus* v. *Carr* has effectively overruled *Hudson County Water Co.* v. *McCarter,* water has been generally regarded as in a special category, compared to other natural resources. *West* v. *Kansas Natural Gas Co.,* 221 U.S. 229, 258-260 (1911). And the Supreme Court has generally refrained from deciding conflicting claims to water rights by states based on property theories. See Trelease, "Government Ownership and Trusteeship of Water," 45 Cal. L. Rev. 638, 651 (1957).

If water is unique, so is land. Water resources are renewable; a landfill is not. If some states are more favorably endowed with usable water than other states, the same cannot be said of land. The states each face the

limits of their own size, but no state is uniquely endowed with the "resource" of suitability for garbage dumping.

Water is ambient and can flow through many states, giving rise to conflicts among upper and lower riparian states and states separated by rivers. *Kansas* v. *Colorado,* 206 U.S. 46, 98 (1907); *Wyoming* v. *Colorado,* 259 U.S. 419, 465, 470 (1922). Water is apportioned among competing states, not in the market-place, not by the laws of supply and demand, but under principles of equitable apportionment among the states in interest as quasi-sovereigns. *New Jersey* v. *New York,* 283 U.S. 336, 342-343 (1931); *Connecticut* v. *Massachusetts,* 282 U.S. 660 (1931). Land is of course fixed in location and is by law and long history subject to local, rather than national, controls. Therefore, the quasi-sovereign interest of the states in their own land and the quality of life on that land should be even farther from doubt.

The Appellants in this case argue the importance of solid waste disposal to the very existence of society even more vociferously than New Jersey or the amici. The exercise of the police power is based upon at least two theories. The first is that poorly maintained landfills will result in a threat to health or that the lack of adequate provision for solid waste is itself a threat to health (*Balch* v. *City of Utica,* 42 App. Div. 562, 59 N.Y.S. 513 (1899), particularly in a high consumption economy not yet geared up for reuse or recycling of its resources in any significant degree. The second is that in providing sufficient total area to meet landfill needs, other amenities, like aesthetic values, are sacrificed. See, e.g., *Town of Oronoco* v. *City of Rochester,* 293 Minn. 468, 471, 197 N.W.2d 426 (1972); Cf. *Parkersburg Builders Material Co.* v. *Barrack,* 118 W.Va. 608, 191 S.E. 368, 192 S.E. 291 (1937).

Unlike water, gas and electricity, which may come from sources distant from the end-users, solid waste disposal is a problem that emanates from human habitation and is

necessarily solved, if at all, locally. Not only are solid waste disposal facilities as essential as electricity, fuel, water, hospitals, schools and police facilities,[15] but such facilities are necessarily a part of the amenities state or local governments provide directly or regulate closely.

If the City of Philadelphia sought to place a municipally owned sewage disposal plant in New Jersey, absent consent or an interstate compact, there would be little hesitation in declaring that it lacked the power to do so. The power of eminent domain is never extraterritorial. *Georgia* v. *City of Chattanooga,* 264 U.S. 472 (1924); *County Court of Wayne County* v. *Louisa & Fort Gay Bridge Co., Inc.,* 46 F. Supp. 1 (S.D.W.Va. 1942).

A state and its municipalities also bear other necessary and natural consequences of human habitation and civilization. Each state and its communities need provide residence-related service to residents, such as public schools, fire and police services and welfare.

Sanitary landfills need not be owned by the State or a municipality in order for the same principles to apply. Whether or not landfills are government owned, they are closely controlled and supervised by government and are indistinguishable from other essential government services. If, under proper enabling law, the state or a municipality desires, it can exercise the power of eminent domain to acquire a landfill site.[16] The real question is whether a state through ownership and operation or through regulation has a substantial interest in the number and rate of use of sanitary landfills.

If the close and necessary relationship of solid waste disposal to government is recognized, New Jersey is no

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[15] They are often considered together. See, e.g., *Cassidy* v. *City of Bowling Green,* 368 S.W.2d 318, 320 (Ky. 1963).

[16] *N. Ward Co.* v. *Board of Street Com'rs of City of Boston,* 104 N.E. 965 (Mass. 1914) 217 Mass. 381; *Snavely* v. *City of Goldendale,* 10 Wash.2d 453, 117 P.2d 221 (1941).

more obligated to provide landfill space to serve the needs of local Pennsylvania governments and their citizens than it is to provide places for Pennsylvania pupils in their schools or police protection to Pennsylvania towns.

Given the universality of the solid waste problem and the limitations of space, the capacity to accommodate solid waste must be promoted everywhere, on the state, local and on the regional levels. Vermont has recognized the problem in its major environmental law, Act 250; 10 V.S.A. § 6086 (a)(9)(K) states:

> "(K) Development affecting public investments. A permit will be granted for the development or subdivision of lands adjacent to governmental and public utility facilities, services, and lands, including, but not limited to, highways, airports, waste disposal facilities, office and maintenance buildings, fire and police stations, universities, schools, hospitals, prisons, jails, electric generating and transmission facilities, oil and gas pipe lines, parks, hiking trails and forest and game lands, when it is demonstrated that, in addition to all other applicable criteria, the development or subdivision will not unnecessarily or unreasonably endanger the public or quasi-public investment in the facility, service, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to the facility, service, or lands."

While statutes in other states may not presently recognize the close relationship between solid waste disposal, land use and economic growth, the relationship is only reflected by Vermont law, not created by it.

To be strictly distinguished is the question of whether a state may prevent nonresidents from enjoying the bene-

fits of state citizens under the Privileges and Immunities Clause, *Toomer* v. *Witsell, supra,* note 9; *Mendiola* v. *Graham,* 139 Ore. 592, 10 P.2d 911 (1932); or whether non-residents can be subject to different standards or fees, *Landwehr* v. *Regents of Univ. of Colo.,* 156 Col. 1, 396 P.2d 451 (Colo. 1964); or whether residency itself may be discouraged by withholding state benefits to newcomers, *Shapiro* v. *Thompson,* 394 U.S. 618 (1969), or by restricting available habitat, *Construction Industry Association* v. *City of Petaluma,* 375 F. Supp. 574 (N.D. Cal. 1974), *reversed,* 522 F.2d 897 (9th Cir. 1975), *cert. denied,* 44 U.S.L.W. 3473 (1976). Anyone is free to travel to New Jersey and, while there as a visitor or resident, to have the solid waste he generates accommodated in New Jersey.

The reasonable regulation of growth is now accepted as a proper land use planning tool. *Construction Industry Association* v. *City of Petaluma, supra; Golden* v. *Planning Board of Town of Ramapo,* 30 N.Y.2d 359, 285 N.E.2d 291, *appeal dismissed,* 409 U.S. 1003 (1972); Cf. *Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974).

It begs the question for the Appellants to argue that their contribution to the solid waste stream in New Jersey will aid the profitability of sanitary landfill operations. (Appellants' brief, p. 20-21, 70-71). The interests of the landfill operators and the State (or its towns) are not necessarily the same. More rapid filling of landfills than planned may mean short-run profits for the operators and long-term costs for the communities that prematurely will require alternative sites for solid waste disposal or will have to curtail or alter planning for growth.

The public policy implications of the Appellants' arguments are fearsome. It may be impermissible for New Jersey to use the accident of natural bounty or industrial development to convey discriminatory economic benefit to her citizens. But it does not follow that New Jersey's

policies for land use, economic growth, environmental control, and aesthetics may be dictated by states that may be less willing to confront the consequences of their own growth policies and which seek a greater ratable share of potential regional growth by exporting the external consequences of growth and industrialization.

In short, the solid waste disposal resources of a state are so closely related to the functioning of state and local government as to preclude their consideration as the subject of interstate commerce.

III. Even Under Commerce Clause Analysis, the New Jersey Statute Should Be Upheld.

(a) *Solid Waste Disposal Is a Legitimate Subject of Local Concern.*

Water and available land for solid waste disposal are subjects of "local concern" not because they are resources located by happenstance in a particular place but because they are resources located everywhere and because the failure of local governments to maintain, promote and regulate these resources will limit both habitability and future economic growth. As one commentator argues:

> "No state is so devoid of water that its very economic livelihood must depend upon those surface or ground waters found wholly within the boundaries of a sister state. There is no justifiable reason which should require that sister state to sacrifice its future growth for the immediate growth of the requesting state." [17]

The argument should be applied even more cogently in the case of solid waste disposal. Technology and popula-

[17] "Land and Water", *supra*, at page 127.

tion growth leave twentieth century man dwelling increasingly astride and occasionally atop the rubble of his own consumption. No valid public policy is promoted if localities are permitted or encouraged to export their waste and postpone the time when the consequences of solid waste will have to be faced. No state Supreme Court has articulated the duty of each locality to face its own future growth needs better than the Pennsylvania Court. *National Land and Investment Company* v. *Kohn*, 419 Pa. 504, 215 A.2d 597, 610 (1965).

There is much argument by the Appellants that New Jersey's "local concern" position discourages regional solutions to solid waste disposal. The image of each separate state clutching its own resources and thwarting the notion of national union is touching but misplaced.

Undoubtedly regional cooperation is essential in solving solid waste problems. Solutions often fail to honor political boundaries. See, e.g., "Interstate Urban Areas and Interstate 'Agreements' and 'Compacts': Unclear Possibilities," 58 Geo. L. Rev. 799 (1970); "Enforcement Problems in the Air Quality Field: Some Intergovernmental Structural Aspects," 4 Ecology Law Quarterly 63 (1974). It is ironic that the Appellants regard the absolute right to use the public or quasi-public resources of a sister state as favoring interstate cooperation in solid waste management. There is little incentive to interstate agreements if states can effectively achieve the desired results through the assertion of extraterritorial powers. Indeed one wonders why interstate solid waste or sewage compacts[18] as well as other pollution compacts[19] are necessary if the argument of Phila-

[18] Ohio River Valley Water Sanitation Compact (ORSANCO), 54 Stat. 752 (1940).

[19] E.g., Tennessee River Basin Water Pollution Control Compact, 72 Stat. 823 (1958). Interstate planning may be a prerequisite to receipt of federal grants for solid waste disposal facilities. 42 U.S.C. §3254b(c)(1)(A) (1973).

delphia in this matter is sustained. See the New Hampshire-Vermont Interstate Sewage and Waste Disposal Facilities Compact, Vermont Public Acts, 1975 No. 116; NH RSA 252-B (supp).

The only essential difference between sewage and solid waste physically is that solid waste does not flow and is generally shipped for disposal by vehicle. Both are major pollution problems and both have aroused the serious concern of both the states and Congress. If New Hampshire could have argued that sewage tanked or piped into Vermont was an article in commerce, one may fairly wonder if the Compact would have been deemed necessary.

The New Hampshire solid waste importation statute, NH RSA 147:30-e, *et seq.* (supp), provides an express recognition of the fact that regional interstate cooperation is necessary. While prohibiting the disposal of extraterritorial-source solid waste in New Hampshire, the statute exempts from that prohibition waste disposed of at a public disposal facility if it originates in an out-of-state municipality that is a member of a New Hampshire regional refuse disposal district, or that has arranged with the host municipality to share public disposal facilities.[20]

(b) *Garbage Transported For Disposal Is Not An Article In Interstate Commerce*

The Appellants have placed the weight of their argument on the proposition that wastes are the recognized subject of interstate commerce. They conceptually combine

[20] NH RSA 147:30-g Exemption. Nothing in RSA 147:30-f shall be construed to prohibit the disposal of out-of-state garbage, manure, putrescible materials or refuse at a public disposal facility provided the out-of-state city or town of origin is a participating member of a New Hampshire regional refuse disposal district as provided in RSA 53-B, or has arranged to share public disposal facilities with a New Hampshire city or town.

"solid and liquid waste" and "The process of collecting, transporting, treating and disposing of same . . ." as jointly the "subject" of interstate commerce.[21] But the services component is truncated. There is no credible argument (and none is made) that the New Jersey law discriminates against the collection and disposal of garbage by non-resident businesses. The New Jersey Act does not bar the performance of services by out-of-state companies, nor does its statute in practice prevent Pennsylvania companies from operating profitably in New Jersey.[22]

The far greater weight of Appellants' argument under the Commerce Clause is based on the assertion that garbage and refuse are articles in interstate commerce. This is apparent from the Appellants' treatment of the issue of evenhandedness (Appellants' brief, p. 29 *et seq.*). The Appellants appear to argue, with not inconsiderable pride, the high quality of out-of-state garbage, as if the real intent of the New Jersey enactment were to protect the reputation of the homegrown product.

Even assuming, *arguendo*, that garbage is an article in interstate commerce (rather than analyzing whether New Jersey has a constitutional right to conserve for its use the space available in the State for solid waste disposal) it is not true that the courts must weigh the value of garbage in interstate commerce as heavily as the value of other things when the competing factor is the public health, safety and welfare. Where a state statute has only an incidental effect on interstate commerce and the nature of the local interest requires protection, the Court may resolve the conflict in favor of the enactment. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142-144 (1970); *Southern*

[21] Appellants' brief, p. 17.

[22] The Appellants are New Jersey, not Pennsylvania, corporations.

Pacific Co. v. *Arizona,* 325 U.S. 761, 770-771 (1945); *Geer* v. *Connecticut,* 161 U.S. 519 (1896); *Sligh* v. *Kirkwood,* 237 U.S. 52 (1915). See Note, "The Constitution and State Control of Natural Resources," 64 Harv. L. Rev. 642, 647 (footnote 43) (1951).

(c) *The New Jersey Statute Does Not Favor Local Commercial Interests*

The focal issue, assuming the relevance of the Appellants' Commerce Clause approach is whether the New Jersey statute discriminates against interstate commerce. The touchstone is that a local commercial interest must be favored for the law to be discriminatory. *Dean Milk Co.* v. *City of Madison,* 340 U.S. 349 (1951); *Baldwin* v. *G. A. F. Seelig, Inc.,* 294 U.S. 511 (1935); *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137 (1970); *H. P. Hood & Sons, Inc.* v. *DuMond,* 336 U.S. 525 (1949).

The corporate Appellants are New Jersey corporations rather than foreign corporations (Appellants' brief, p. 19). In any case the practical effect of the New Jersey law is not discriminatory. Out-of-state haulers are free to compete with New Jersey haulers. Since the principal commodity in commerce is the right to fill up New Jersey landfill space, Pennsylvania or New Jersey operators can come into the State to compete on the same basis as local haulers. Pennsylvania garbage haulers may complain that the need to travel to New Jersey to conduct business puts them at a competitive disadvantage, and this is true. Similarly, Pennsylvania construction companies bidding on highway construction jobs in New Jersey face the costs, both initial and ongoing, of operating at a greater distance from home than local bidders. The answer is that the cost difference is not the result of an effort to "protect local industry", *Dean Milk* v. *City of Madison,* 340 U.S. 349,

354 (1951) but a consequence of where the work is done. New Jersey inhabitants produce sewage and solid waste in New Jersey rather than elsewhere. The disposal of this waste is a problem which must be solved by local and state government. The practical effect as well as the statutory intent of the New Jersey law is to promote the maintenance of essential municipal life services at the local level by conserving effective and safe landfills which reach their capacities within predictable time frames. Allowing for rational planning and allocation of future alternatives is a fact of twentieth century life and not a facially neutral form of words artfully devised to solve a problem in a manner calculated to favor local business interests.

By comparison the Supreme Court cases striking down the state laws discriminating against interstate commerce all evidence a purpose to favor local interests where that purpose was not in the slightest the necessary result of the nature of the problem giving rise to the legislation. *Dean Milk Co., supra,* ("Health measure" prohibited the sale of milk not pasteurized and bottled within five miles of City of Madison); *Pike* v. *Bruce Church, Inc., supra* (Arizona statute prohibited transportation of uncrated cantaloupes outside the state for packaging and processing).

Closer to the subject matter of the New Jersey statute on its facts is *Alexandria Scrap Corporation* v. *Hughes,* 391 F.Supp. 46 (D.Md. 1975). There a three-judge court struck down that part of an overall statutory plan to deal with abandoned vehicles which limited statutory protection from claims of owners to scrap processors with a plant physically located in Maryland. The statutory indemnity bore no necessary relationship to the nature of the scrap processing business, since the purposes of the law were the removal of abandoned vehicles and the encouragement of recycling or reprocessing the resultant scrap. The end

product in commerce was processed scrap, and the legislation was a plain effort to favor Maryland plants by limiting liability arising out of their operations. There was no logical or necessary relationship between the preference for in-state processors and the successful management of the abandoned vehicles problem. And to the extent optimal competition was thwarted, the problem was dealt with less efficiently and discriminatorily under the scheme.

It is evident that the principal—the only—purpose of the New Jersey legislation is not to boost the local carting business but to preserve available landfill space for contiguous inhabited areas. There are no "reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests. . . ." *Dean Milk Co., supra,* 340 U.S. at 354; and *Pike* v. *Bruce Church, Inc., supra,* 397 U.S. at 142.

Distinguishable are cases like *Pennsylvania* v. *West Virginia,* 262 U.S. 553 (1923) and *West* v. *Kansas Natural Gas Co.,* 221 U.S. 229 (1911). These cases explicitly deal with the attempt by one state to "regulate the interstate business to the advantage of the local consumers." (262 U.S. at 598). Or as said in *Kansas Natural Gas:*

> "In other words, the purpose of its conservation is in a sense commercial—the business welfare of the State, as coal might be, or timber. Both of these products may be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a State would confine them to the inhabitants of the State." (221 U.S. at 255.)

Kansas Natural Gas and *Pennsylvania* v. *West Virginia* are not essentially different from any of the cases dealing with economic discrimination by one state against the citizens of another.

When dealing with those cases in which a state purports to be "conserving" articles in commerce—and natural gas, water, fish, timber and coal are perhaps the essence of the category—the general rule, or at least the trend of the cases, is that if the commodity is scarce, the scarcity as well as the commodity are to be shared according to the dictates of the interstate marketplace and not the will of the legislature in which the commodity originates.[23] We have no quarrel with this rule. It simply does not apply where the actual commodity is land of no especial quality or endowment which is being transformed into a landfill, a function of state ownership or regulation through the exercise of state police powers.

The Appellants spend many pages in the context of cases in which local police power statutes are upheld *vel non* if they have only incidental impact on interstate commerce if they are applied evenhandedly. *Huron Portland Cement Co.* v. *Detroit, supra,* and the additional citations on p. 38 of the Appellants' brief. It is axiomatic that the New Jersey statute discriminates between New Jersey-source garbage and refuse and the out-of-state product. The question is, given the nature of the waste control problem and its close and necessary relationship to the functioning of State and local government, whether New Jersey has the right to take state-regulated landfills out of commerce altogether. This question is not addressed by the Appellants.

Their brief cites *Foster-Fountain Packing Co.* v. *Haydel,* 278 U.S. 1 (1928). The Court in that case recognized that one means of avoiding discrimination in interstate commerce is to have the state retain the subject in controversy solely for state use and thereby not favor local producers who would then be barred along with out-of-state producers from shipping in interstate commerce. The court there said:

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[23] *H. P. Hood & Sons, Inc.* v. *DuMond,* 336 U.S. 525 (1949); *Pennsylvania* v. *West Virginia,* 262 U.S. 553 (1923).

"* * * As the representative of its people, the state might have retained the shrimp for consumption and use therein. But, in direct opposition to conservation for intrastate use, this enactment permits all parts of the shrimp to be shipped and sold outside the state. The purpose is not to retain the shrimp for the use of the people of Louisiana; it is to favor the canning of the meat and the manufacture of bran in Louisiana by withholding raw or unshelled shrimp from the Biloxi plants . . . ." (278 U.S. at 13).

While we would not argue the present day force of *Foster* to goods customarily sold in interstate commerce, the language of the Court makes great sense where the subject matter—here, a state's available landfill resources—is closely related to the necessary functions of government and where government control or ownership is not imposed simply to lend credibility to discrimination against interstate commerce.[24]

The Appellants focus on the real issue in this case on p. 59 of their brief, but only in a hypothetical context:

> "Even if the New Jersey Supreme Court was correct in finding that the preservation of land represented a legitimate local purpose. [sic]
>
> '. . . extending the lifespan of existing landfills and thereby preserving further acreage from use

[24] Compare *Toomer* v. *Witsell*, 334 U.S. 385, 401 where the Court said, "To put the claim of the State upon title is to lean upon a slender reed . . ." quoting from *Missouri* v. *Holland*, 252 U.S. 416, 434 (1920). There is no discrimination in favor of local businesses in the present case; the Appellants *include* local businesses, and the City of Philadelphia asserts that its contribution to New Jersey sanitary landfills may in some instances be essential to their survival. Appellants' brief, page *20*.

> as disposal sites is a legitimate and valid exercise of the police power of the State.'
>
> *Hackensack Meadowlands* v. *Mun. Landfill Auth.*, 68 N.J., *supra*, at 472.
>
> then there was still no basis to prohibit (a) entry, and (b) other authorized and regulated forms of disposal, including resource recovery and incineration."

Given that the New Jersey Supreme Court was correct in finding that land preservation is a legitimate local purpose, a proposition which today is beyond doubt, the New Jersey statute could then be overturned only if it was unreasonable in relation to its purpose. Not since the nineteen thirties has the Supreme Court invoked the doctrine of substantive due process to sit as a super-legislature in judgment of state statutes. And without conceding for a moment that any alternatives are realistically possible to the State of New Jersey in seeking to promote the orderly development and use of its land for solid waste disposal, the Appellants do not suggest any. Rather they attack the statute's exception for garbage to be fed to swine (Appellants' brief, p. 59); assert their interested judgment that out-of-state garbage would be a good thing for New Jersey sanitary landfills (Appellants' brief, p. 63), the uniform quality of solid waste originating inside and outside of New Jersey (Appellants' brief, pp. 64-65), and finally the conclusion that "the legitimate local interests of the State have already been protected, without exclusion, by the adoption of state administrative regulations applicable alike to intrastate commerce and interstate commerce." (Appellants' brief, p. 68).

Having assumed *arguendo* that the New Jersey Supreme Court was correct in finding that preservation of land

represented a legitimate local purpose, the fact that all sanitary landfills in New Jersey will be maintained in healthful condition does not overcome the strong presumption in favor of a state enactment. If it is legitimate for a State in the process of planning for land use, for public investment, for rational economic growth and for the preservation of aesthetic values to limit the number of sanitary landfills to a number which would be reasonably related to the foreseeable needs of the people of the state (or the region under appropriate interstate compact or governing federal law), it is no answer to the imposition of a limit that the sanitary landfills in excess of those required and planned for by the State will all be models of hygiene.

Conclusion

For the reasons set forth herein, the States of Vermont and New Hampshire urge that the decision of the Supreme Court of New Jersey be upheld.

Respectfully submitted,

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